

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.

Plaintiffs,

VS.

Tyson Foods, Inc., et al.,

Defendants.

Case No. 4:05-cv-00329-GKF-PJC

**DEFENDANTS' JOINT MOTION
TO MODIFY MAY 8, 2009
SCHEDULING ORDER (DKT. NO. 2026)**

EXPEDITED CONSIDERATION
REQUESTED

The undersigned Defendants respectfully move this Court for an order modifying the May 8, 2009 Scheduling Order to extend until June 19, 2009 the date for Defendants to bring a Daubert challenge to Plaintiffs’ “ability to pay” expert David Payne. In addition, to the extent that the parties have misconstrued the Court’s May 8 Order insofar as it relates to the deadline for Defendants to bring a Daubert motion addressing the Stratus Consulting report (authored by seven experts), Defendants would also seek to extend until June 19, 2009 that deadline.¹

Good cause for amendment is shown where the existing schedule “cannot reasonably be met despite the diligence of the party needing the extension.” Thompson v. Jiffy Lube Int’l, Inc., 505 F. Supp. 2d 907, 913 (D. Kan. 2007) (quoting, e.g., Fed. R. Civ. P. 16 advisory committee note (1983)). Because Defendants demonstrate good cause for this narrow extension of the Daubert deadline, the Court should grant this motion. See Fed. R. Civ. P. 16(b).

¹ Defendants have conferred with Plaintiffs, and are informed that Plaintiffs oppose this request.

A. David Payne

The deposition of Plaintiffs’ “ability to pay” punitive damages expert Mr. Payne took place over April 27 and 28, 2009. Unlike the other of Plaintiffs’ experts, Mr. Payne issued a separate report unique to each Defendant group. The reports pertaining to the privately held Defendants contained highly sensitive proprietary and confidential information; Defendants are, after all, competitors with one another. The parties have not yet received the official transcript, various portions of which several Defendants must designate as “attorneys’ eyes only” under the Protective Order before the transcript may be widely released.

As a result of these logistical realities, Defendants are unable despite due diligence to meet the May 18 existing Daubert deadline for Mr. Payne. See Thompson, 505 F. Supp. 2d at 913. Defendants seek an extension until June 19, 2009. (See Dkt. No. 2026.)

B. Stratus Consulting

Plaintiffs’ disclosed expert report entitled “Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma’s Illinois River System and Tenkiller Lake” – referred to by all parties as “the CV Report” – has seven authors from the firm Stratus Consulting. Plaintiffs have maintained that “the CV Report was a collaborative effort.” (E.g., Dkt. No. 1952 at 4.)

The seven Stratus authors were deposed over the course of April 6 to May 5, 2009. Only three of the deposition transcripts have been completed:

Stratus Author	Date of Deposition	Official Transcript Received?
David Chapman	April 6	yes
Roger Tourangeau	April 8	yes
Barbara Kanninen	April 28	yes
Edward Morey	April 29	no

Richard Bishop	April 30	no
Jon Krosnick	May 1	no
Michael Hanemann	May 5	no

Since a Daubert challenge to the opinions contained in the Stratus report must necessarily address each of the seven experts in order to effectively discuss the report's collective conclusions, and as the final Stratus deposition concluded on May 5, Defendants interpret section 1.1 of the Court's May 8 Scheduling Order to mean that any Stratus Daubert motion would be due on June 19, 2009. (See Dkt. No. 2026.)

If this construction of the Court's Order is incorrect, Defendants request that the schedule be modified accordingly. Because the transcripts of these depositions are not yet prepared, and indeed, the depositions were just completed this week, Defendants are unable despite due diligence to meet a May 18 Daubert deadline for the Stratus report. Thus, modification of the schedule would be warranted. See Thompson, 505 F. Supp. 2d at 913.

C. Expedited Consideration

Given that the Court entered an expedited briefing schedule on Plaintiffs' motion for several extensions to the May 18 Daubert deadline, Defendants request that the Court likewise grant expedited consideration of the instant motion. (See Dkt. No. 2022.) Defendants respectfully submit that these matters would be best briefed on the same schedule, with the response to this motion due on May 12 and the reply on May 14, 2009.

CONCLUSION

For the reasons set forth above, the Court should allow this slight modification in the pretrial schedule.

Dated: May 8, 2009

Respectfully submitted,

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

BY: s/ John H. Tucker

JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173
(918) 592-3390 Facsimile

And

DELMAR R. EHRICH
BRUCE JONES
KRISANN C. KLEIBACKER LEE
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000
(612) 766-1600 Facsimile

**ATTORNEYS FOR CARGILL, INC. AND CARGILL
TURKEY PRODUCTION LLC**

BY: /s/ Michael Bond
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
MICHAEL BOND, AR Bar No. 2003114
ERIN WALKER THOMPSON, AR Bar No.
2005250

DUSTIN DARST, AR Bar No. 2008141
KUTAK ROCK LLP
234 East Millsap Road Suite 400
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-AND-

STEPHEN L. JANTZEN, OBA No. 16247
PATRICK M. RYAN, OBA No. 7864
PAULA M. BUCHWALD, OBA No. 20464
RYAN, WIALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
E-Mail: sjantzen@ryanwhaley.com

-AND

THOMAS C. GREEN
MARK D. HOPSON
TIMOTHY K. WEBSTER
JAY T. JORGENSEN
GORDON D. TODD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
A. SCOTT MCDANIEL, OBA 16460
NICOLE LONGWELL, OBA 18771
PHILIP D. HIXON, OBA 19121
McDaniel, Hixon, Longwell & Acord, PLLC
320 S. Boston Avenue, Suite 700
Tulsa, OK 74103
-AND-
SHERRY P. BARTLEY, AR BAR #79009
MITCHELL WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
**ATTORNEYS FOR PETERSON FARMS,
INC.**

BY: /s/ Randall E. Rose
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
RANDALL E. ROSE, OBA #7753
GEORGE W. OWENS, ESQ.
OWENS LAW F P.C.
234W. 13 Street
Tulsa, OK 74119
-AND-
JAMES MARTIN GRAVES, ESQ.
GARY V. WEEKS, ESQ.
BASSETT LAW FIRM
POB 3618
Fayetteville, AR 72702-3618
**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/John R. Elrod

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

JOHN R. ELROD

VICKI BRONSON, OBA #20574

BRUCE WAYNE FREEMAN

CONNER & WINTERS, L.L.P.

100 W. Central Street, Suite 200

Fayetteville, AR 72701

**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

ROBERT P. REDEMANN, OBA #7454

LAWRENCE W. ZERINGUE, ESQ.

DAVID C. SENGGER, OBA #18830

PERRINE, MCGIVERN, REDEMANN, REID,

BARRY & TAYLOR, P.L.L.C.

Post Office Box 1710

Tulsa, OK 74101-1710

-AND-

ROBERT E. SANDERS

STEPHEN WILLIAMS

YOUNG, WILLIAMS, HENDERSON &

FUSILIER

Post Office Box 23059

Jackson, MS 39225-3059

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

CERTIFICATE OF SERVICE

I certify that on the 8th day of May, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General
J. Trevor Hammons, Assistant Attorney General
Daniel Lennington, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us
trevor_hammons@oag.state.ok.us
Daniel.lennington@oag.ok.gov

Melvin David Riggs
Joseph P. Lennart
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
David P. Page
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
J. Randall Miller
Miller Keffer & Bullock Pedigo LLC

lbullock@mkblaw.net
rmiller@mkblaw.net

William H. Narwold
Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Fidelma L Fitzpatrick
Motley Rice LLC

bnarwold@motleyrice.com
lward@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com
cxidis@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Paula M. Buchwald
Patrick Michael Ryan
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Sidley Austin LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com

L Bryan Burns
Robert W. George

bryan.burns@tyson.com
robert.george@tyson.com

Michael R. Bond
Erin W. Thompson
Dustin R. Darst
Kutack Rock LLP

michael.bond@kutackrock.com
erin.thompson@kutackrock.com
dustin.dartst@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;
AND COBB-VANTRESS, INC.**

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Bassett Law Firm

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
P. Joshua Wisley
Conner & Winters, LLLP

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Craig Mirkes
McDaniel, Hixon, Longwell & Acord, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

Michael D. Graves

mgraves@hallestill.com

Dale Kenyon Williams, Jr.

kwilliams@hallestill.com

COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green

Sidley Austin Brown & Wood LLP

1501 K Street NW

Washington, DC 20005

**COUNSEL FOR TYSON FOODS,
INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC.; AND
COBB-VANTRESS, INC.**

s/ John H. Tucker